> currently possess substantial market power. An in-region LMDS license would be valuable to these firms not only because they could use it as other firms would, but also because, by obtaining the license, they could preserve excess profits that an independent LMDS competitor would erode....
>
> ....
>
> Our concern regarding LEC and cable eligibility is educated by the substantial record collected in this proceeding on the capabilities of LMDS.... LMDS offers a significant amount of capacity, larger than currently available wireless services.... [W]e believe that the likelihood that LMDS can increase competition in either the local multichannel video or local telephone exchange markets (or both simultaneously) is high and warrants analysis in order to determine whether in-region LEC and cable TV incumbents should be permitted to acquire and hold initial licenses.
>
> While all bidders in an auction for LMDS licenses can be expected to base their bids on their individual assessment of the most efficient use of the spectrum, LECs and cable companies assessing the value of in-region LMDS licenses would have the additional incentive to protect their market power and preserve a stream of future profits.

Order ¶¶ 162–63, 170–71. We find that this explanation is both reasonable and adequate support for the FCC's predictive judgment.

b. *The Claim That the FCC Failed to Consider Record Evidence*

The rural LECs next argue that the FCC's Order failed to address comments in the record from the rural telephone community that contended that an in-region eligibility restriction on rural LECs "would harm the ability of rural telephone companies to provide LMDS in their service areas." Rural LEC Brief, at 17. This argument is somewhat odd. One would naturally expect that an *eligibility restriction* on rural LEC acquisition of in-region LMDS licenses would, by its

very nature, "harm"—to some degree—"the ability of rural telephone companies to provide LMDS in their service areas"; that, in fact, is the restriction's purpose. Indeed, no one, including the FCC, disputes this point, although the FCC has determined for the reasons elaborated below that ultimately the in-region restriction will have a relatively small impact on the rural LECs' ability to participate in the LMDS auction. *See* Order ¶¶ 179–80. We believe the real question presented here is whether the FCC can exercise its judgment that a restriction on the incumbent rural LECs is merited in order to counteract the rural LECs' present monopoly power. Moreover, while the rural LECs assert that the FCC failed to consider "record evidence," they point to no evidence in the record. Instead, the portions of the record that the rural LECs cite simply assert that the eligibility restriction will harm rural LECs. *See* Rural LEC Brief, at 17, *citing* Joint Appendix, at 665–67, 672–74, 765–66, 774–76.

The rural LECs go on to cite the Order at paragraph 179 for the proposition that the FCC has established a standard whereby "in order for a rural telephone company to be entitled to an opportunity to participate in a new service, the rural telephone company must first demonstrate that it is the *only* entity that can provide the service [in rural areas]." *Id.* Instead, however, paragraph 179 only rejects the *rural LECs'* contention "that they are the only entities that can provide service in their service territories." It reads:

> Commenters from the rural telephone community .... reason that unless rural telephone companies are able to participate in the LMDS market, consumers in rural areas are likely to be deprived of the benefits of this new service. We agree that it would be undesirable to impair the provision of LMDS service to rural consumers. Although we have decided to impose some short-term restrictions in LECs, including rural telephone companies, we do not believe that these restrictions, as crafted, will hinder the introduction of LMDS in rural areas. Rural LECs have not made the case that they are the

> only entities that can provide LMDS in their service territories.

Order ¶ 179.

The rural LECs have mischaracterized the FCC's rationale for its Order and pointed to no record evidence that the Commission failed to consider.

c. *The Claim That the FCC's Conclusion That the Eligibility Restriction Will Not Compromise Rural Telephone Company Participation in LMDS is Arbitrary and Capricious*

As we indicated above (*see* II.B.2.b.), we have not been able to find (and, for the reasons discussed above, would not expect to find) any statement within the FCC's Order asserting that the eligibility restriction will have *no* negative effect on rural LEC participation in LMDS. Instead, the FCC's Order "conclude[s] that the interests of rural telephone companies are adequately addressed by the LMDS rules we adopt herein," Order ¶ 362, and explains the various opportunities that remain open to rural LECs. We evaluate the specific claims that the rural LECs make about that FCC conclusion in this light.

1. *The Claim That the FCC's Conclusion That Rural Telephone Companies Will Not Trigger the Eligibility Restriction is Arbitrary and Capricious*

The rural LECs take issue with the FCC's determination that "because rural LECs are generally small, they are unlikely to have the degree of overlap with BTAs [basic trading areas] necessary . . . to trigger our eligibility restriction." *Id.* ¶ 180. This statement refers to the fact that the FCC's eligibility restriction only applies to a LEC if ten percent or more of the population in the BTA that the desired LMDS license covers is also within the LEC's authorized telephone service area. *See id.* ¶ 188. This determination appears in the FCC's Order as one of several reasons why the FCC concluded that its restriction on rural LECs will not "hinder the introduction of LMDS in rural areas." *Id.* ¶ 179. The rural LECs argue that the FCC's prediction of relatively

modest effects on rural LEC eligibility is arbitrary and capricious because the application of the restriction turns on the overlap between a LMDS license's BTA and a LEC's telephone service area, rather than on the size of a rural LEC. However, it is not difficult to see a logical connection between the FCC's overlap criteria and a rural LEC's size: The smaller a LEC, the less likely it is to be servicing a customer base that constitutes ten percent or more of the population within a BTA, particularly because the BTAs for LMDS licenses, which are quite large, have no necessary correlation to the boundaries of rural telephone companies' service areas. *See id.* ¶¶ 135, 138, 180.

The rural LECs also claim that the FCC's determination is arbitrary and capricious because the FCC did not "conduct an analysis of the actual degree of overlap between LMDS license areas and rural telephone company service areas." Rural LEC Brief, at 19. The rural telephone companies do not claim to have the detailed information that such an analysis covering hundreds of rural LECs would require, or to have offered to collect it for the FCC; they argue, instead, that the FCC should have secured this information during its rulemaking. Given that all the data needed for an overlap analysis presumably exists—the boundaries of the BTAs for LMDS licenses and the current authorized service areas for rural LECs are both established—the FCC might profitably have undertaken such a factual investigation. However, we do not believe that the comprehensive factual analysis that the rural LECs would have liked was actually required of the FCC in this case. The FCC was entitled to conduct, and did conduct, a general analysis based on informed conjecture. Specifically, a BTA is typically constructed around an "urban commercial center," where the population of the BTA will be most concentrated; BTAs are not designed to follow the same lines as rural LEC service areas. Order ¶ 138. BTAs also tend to be quite large: The FCC divided the fifty states into only 487 BTAs. *See id.* ¶ 135. The FCC accordingly drew a reasonable inference from its general knowledge that "rural LECs are generally small," and concluded that rural LECs were "unlikely" to have the necessary overlap, although some

number of rural LECs will presumably meet the overlap requirement's threshold. *Id.* ¶ 180.

In the final analysis, the number of rural LECs that will or will not fall within the ten percent overlap rule was not the determinative issue. The FCC was operating on the premise that if a LEC services a customer base that constitutes more than a small percentage of a BTA, then the risk of impeded competition in the telephony market is great enough to warrant an in-region eligibility bar. The exact percentage of rural LECs covered under a ten percent overlap rule was not the primary question, and the precise identification of that percentage through a detailed and expensive study would not likely have led the FCC to a different conclusion about whether to impose a ten percent overlap rule.

2. *The Claim That the Divestiture Provision Does Not Reduce the Adverse Impact on Rural Telephone Companies*

Under the FCC's Order, a LEC can buy a LMDS license as long as it divests itself of any overlapping service areas or interests within ninety days. *See id.* ¶ 194; *see also id.* ¶ 180. The FCC observed in a footnote that:

> Such flexibility should be particularly useful for those rural LECs that may have overlapping ownership interests in a BTA. Although we anticipate that most rural LECs would not have sufficient overlap of their authorized service area with the LMDS service area to be affected by the eligibility restrictions we are adopting, the additional flexibility to divest such overlapping ownership interests should further ameliorate any potential negative impact on these entities.

Id. ¶ 194 n.302. The rural LECs argue that, in fact, this divestiture provision will be "singularly unhelpful" to them "because the areas rural telephone companies have a desire and ability to serve are those within and adjacent to their service area." Rural LEC Brief, at 20.

We do not believe that this claim renders the FCC's decision to include rural LECs in its eligibility restriction

arbitrary or capricious. Some—perhaps even a large—percentage of rural LECs will not find the divestiture provision in the FCC's Order an attractive solution to all their "problems." But that does not mean that the availability of this option does not increase a rural LEC's flexibility, nor does it mean that the divestiture provision will not help some rural LECs. And we see no evidence that the FCC is claiming more for its divestiture provision than that.

3. *The Claim That the FCC's Conclusion That Geographic Partitioning Will Ensure the Dissemination of Licenses to Rural Telephone Companies is Arbitrary and Capricious*

One of the reasons that the FCC cited in support of its conclusion that its eligibility restriction will not impede the introduction of LMDS in rural areas was that

> to the extent any LEC is unsuccessful in the LMDS auction, it will still have the opportunity to participate—subject to the eligibility rules—by either acquiring spectrum from an LMDS licensee through the partitioning and disaggregation rules we are adopting, or by contracting (in a way that does not circumvent any applicable ownership and control requirements and does not raise competitive concerns) with the LMDS licensee to provide service in its telephone market area.

Order ¶ 180. The rural LECs argue that the FCC's partitioning rules are "effectively ... useless" for rural LECs because if the customer base of a rural LEC constitutes more than ten percent of the population in a BTA, partitioning the BTA will not enable the LEC to avoid the FCC's ten percent overlap rule. Rural LEC Brief, at 21. We agree that the partitioning rules would be more useful to rural LECs seeking to offer in-region LMDS service if they provided a means to circumvent the ten percent overlap rule. However, that is not the purpose of the partitioning rules. Rather, the FCC intended for its partitioning rules to help rural LECs by making ownership of a LMDS service more affordable. With the assistance of these rules, a rural LEC seeking to provide

LMDS service does not have to garner sufficient capital to purchase and then effectively utilize an entire LMDS license; instead, a rural LEC can buy or lease part of a LMDS license from its original owner. *See* Order ¶ 141 ("We determined that the issue of geographic partitioning should be considered to enable LMDS licensees to recoup some of their initial licensing and construction costs, while providing a method for entities with specific local concerns or insufficient capital to purchase rights for the entire service area, to acquire a portion of the geographic area originally licensed."); *id.* ¶ 145 ("[T]he nature of the LMDS cell structure makes disaggregation and partitioning powerful tools for licensees to concentrate on core areas or to deliver services to isolated complexes, such as rural towns or university campuses, that do not lie within major market areas. We further believe that disaggregation and partitioning will provide opportunities for small businesses seeking to enter the MVPD and local telephony marketplaces."); *id.* ¶ 362 ("[T]he degree of flexibility we will afford in the use of this spectrum, including provisions for partitioning or disaggregating spectrum, should assist in satisfying the spectrum needs of rural telephone companies at low cost."). We find the FCC's conclusion, that its partitioning rules will help rural LECs acquire LMDS licenses by making smaller, more affordable licenses potentially available, reasonable.

The rural LECs go on to assert that only six partitioning deals have thus far been consummated in auction-licensed services and argue, citing a trade periodical, that licensees are reluctant to enter into partitioning agreements with small and/or rural entities due to transaction costs and the difficulty of earning a profit. We reject this argument on two grounds. First, the FCC's partitioning rules at issue here govern the implementation of a new technology in a brand-new market. These are the precise sorts of circumstances in which the Commission's predictive judgment demands great deference, *see NCCB,* 436 U.S. at 813–14; *AT&T,* 832 F.2d at 1291, and in this case the FCC's Order explains the technologically-based reasons for the Commission's conclusion that partitioning will be an attractive option for LMDS licensees. The

Order, for instance, "observ[es] that continued technological improvements may reduce the amount of spectrum required to provide a full range of services." Order ¶ 140. The Order also cites with approval comments in the record "contend[ing] that the relatively high cost of LMDS construction and the shorter transmission paths it provides, in addition to the limitation of service to consumers within reach of cell transmitters, lend support for the Commission's proposals with regard to geographic partitioning." *Id.* ¶ 143. Second, even if rural LECs will encounter difficulties in finding parties willing to contract with them for part of a LMDS license, we do not believe that this would make it arbitrary or capricious for the FCC to list its partitioning rules as one of the actions it is taking to promote LMDS service in rural areas.

3. *The Argument That the Application of the In–Region Eligibility Restriction to Rural Telephone Companies Hinders the Rapid Deployment of LMDS to Rural America and is Arbitrary and Capricious*

   a. *The Claim That There is No Evidence to Support the FCC's Conclusion That Competitive Forces Will Ensure the Provision of LMDS to Rural America*

The rural LECs challenge the FCC's statement that "we do not believe that these [eligibility] restrictions, as crafted, will hinder the introduction of LMDS in rural areas.... [I]f it is profitable to provide service in rural areas, a licensee should be willing to do so, either directly or by partitioning the license and allowing another firm to provide service." *Id.* ¶¶ 179–80. The rural LECs argue that such reliance on the market is "outrageous" in this context because, historically, rural areas have not attracted many potential competitors. Rural LEC Brief, at 25. Although the rural LECs do not assert that they will be able to provide LMDS service in rural areas at less expense than other possible providers, they claim that they have a natural interest in providing additional communications services in rural areas where they are already operating.

We do not find this argument persuasive. First, in making a predictive judgment about the future operation of the

brand-new market in LMDS, the FCC is entitled to a very substantial measure of deference and is clearly not required to rely on the history of other markets in other technologies. *See NCCB*, 436 U.S. at 813–14; *AT&T*, 832 F.2d at 1291. Second, the rural LECs have not indicated why they would be able to provide LMDS in rural markets if provision of that service would in fact be unprofitable. They have presented no evidence and made no argument, for instance, that they would be able to provide LMDS in rural areas at less expense than potential competitors would incur. In this light, it seems perfectly sound—indeed commonsensical—for the FCC to conclude that the rural LECs can only want increased access to the rural LMDS market precisely because they think that this market will be profitable (or possibly because they want to protect their telephone monopolies).

b. *The Claim That the FCC Gave No Consideration to the Universal Service Principles Set Forth in Sections 309(j)(3)(A) and 254(b)(3) When It Imposed the Eligibility Restriction on Rural Telephone Companies*

47 U.S.C. § 309(j)(3)(A) provides that the FCC "shall seek to promote," *inter alia*, "the development and rapid deployment of new technologies, products, and services for the benefit of the public, *including those residing in rural areas*, without administrative or judicial delays" (emphasis added). 47 U.S.C. § 254(b)(3) provides that:

> Consumers in all regions of the Nation, including low-income consumers and *those in rural, insular, and high cost areas*, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

(emphasis added).

We believe that the rural LECs err in their claim that the FCC's Order does not adequately consider the universal

service principles set forth in these sections. To be sure, the FCC's Order does not address this issue by name; its explicit reference to the universal service goals in the context of providing LMDS to rural areas is limited to a paragraph. *See* Order ¶ 271 & n.403. But the Order does make clear that the FCC did consider the substance of the universal service issue. As a key passage of the Order on rural LECs explains, the FCC Commissioners "agree[d] that it would be undesirable to impair the provision of LMDS service to rural customers." *Id.* ¶ 179. The Commissioners concluded, however, that the Order's eligibility restriction would not in fact "hinder the introduction of LMDS in rural areas" for the series of reasons discussed throughout this section. *Id.* In this light, the rural LECs' argument devolves into a rehashing of the contention, rejected above, that the FCC was arbitrary or capricious in disagreeing with the rural LECs' claim that the eligibility restriction will leave rural areas without LMDS service.

c. *The Claim That the FCC's Performance Requirements When Coupled With the Eligibility Restriction Mean That Rural America Will Not Receive LMDS in Direct Violation of Section 309(j)(4)(B)*

47 U.S.C. § 309(j)(4)(B) states that "the Commission shall"

> include performance requirements, such as appropriate deadlines and penalties for performance failures, *to ensure prompt delivery of service to rural areas,* to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services.

(emphasis added). In its Order, the FCC decided to

> adopt very flexible build-out requirements for LMDS. Specifically, we will require licensees to provide "substantial service" to their service area within 10 years. Although LMDS licensees will have incentives to construct facilities to meet the service demands in their licensed service area, we believe that minimum construction requirements can promote efficient use of the spec-

> trum, encourage the provision of service to rural, remote, and insular areas, and prevent the warehousing of spectrum.
>
> . . . .
>
> . . . [F]or an LMDS licensee that chooses to offer point-to-multipoint services, a demonstration of coverage to 20 percent of the population of its licensed service area at the 10–year mark would constitute substantial service.

Order ¶¶ 266, 270. The Order went on to state that:

> We believe that these build-out provisions fulfill our obligations under Section 309(j)(4)(B). We also believe that the auction and service rules which we are adopting for LMDS, together with our overall competition and universal service policies, constitute effective safeguards and performance requirements for LMDS licensing. Because a license will be assigned in the first instance through competitive bidding, it will be assigned efficiently to a firm that has shown by its willingness to pay market value its willingness to put the license to its best use. We also believe that service to rural areas will be promoted by our proposal to allow partitioning and disaggregation of LMDS spectrum.

Id. ¶ 271.

The rural LECs argue that these relatively undemanding performance requirements, together with the eligibility restriction on rural LECs, will hinder the delivery of LMDS to rural areas. In their view, LMDS licensees offering point-to-multipoint services will meet the requirement that they cover twenty percent of the population in their licensed service areas within ten years by serving urban areas and avoiding rural ones; once the licensees' build-out benchmarks are met, the rural LECs continue, the licensees will lack any incentive (given the high transaction and other costs associated with serving sparsely populated regions) to negotiate partitioning agreements with businesses seeking to serve rural areas. This is not an implausible scenario. However, it does not

render the Commission's alternate predictive judgment unreasonable.

The FCC concluded, based on its prior analogous experience with Wireless Communications Services ("WCS"), that strict build-out requirements might discourage the acquisition of LMDS licenses, given the wide variety of services that LMDS can potentially support and the substantial uncertainties that presently exist as to the best uses for LMDS. *See id.* ¶ 267. In light of this danger, the Commission decided to adopt liberal build-out requirements.

We agree that this decision is a reasonable interpretation of section 309(j)(4)(B), a provision that endorses three different, and potentially competing, goals. First, the FCC's reasoning was clearly in accord with section 309(j)(4)(B)'s concern that the agency "promote investment in and rapid deployment of new technologies and services." 47 U.S.C. § 309(j)(4)(B). Moreover, if strict build-out requirements pose a threat to the rapid development of the LMDS spectrum, that danger will also threaten section 309(j)(4)(B)'s goal of "ensur[ing] prompt delivery of service to rural areas." *Id.* As for section 309(j)(4)(B)'s third goal, "prevent[ing] stockpiling or warehousing of spectrum by licensees or permittees," *id.*, the FCC Commissioners decided, in their expert judgment, that this danger did not loom large enough to mandate stricter build-out requirements. They also expressly "reserve[d] the right to review our liberal construction requirements in the future if we receive complaints related to Section 309(j)(4)(B), or if our own monitoring initiatives or investigations indicate that a reassessment is warranted." Order ¶ 272.

C. *The Waiver Applicant Petitioners*

The waiver applicant petitioners seek review of the FCC's decision, released on January 8, 1993, while the Commission was devising its current LMDS regime, that denied them waivers of the rules that formerly governed use of the spectrum now designated for LMDS. *See* first NPRM ¶¶ 51–53. The rejected waiver applicants filed petitions with the FCC for reconsideration on February 8, 1993. Concurrently, the rejected applicants filed petitions for review with this

court. *See* Brief of Petitioners James L. Melcher, *et al.*, at 3; Order ¶ 385 n.595. On April 15, 1993, this court ordered those latter petitions held in abeyance pending completion of the FCC proceeding. On March 13, 1997, the FCC denied the rejected applicants' petitions for reconsideration. *See* Order ¶¶ 383–406. Many of the rejected applicants did not then file timely new appeals with this court. However, at least two rejected applicants, Celltel Communications Corporation ("Celltel") and CT Communications Corporation ("CT"), who had dismissed their petitions for reconsideration that were before the FCC, filed timely new petitions for review with this court on August 11, 1997. This court consolidated these two petitions into the present case on September 8, 1997.

The FCC argues that *TeleSTAR, Inc. v. FCC*, 888 F.2d 132 (D.C. Cir. 1989) (per curiam), and *Wade v. FCC*, 986 F.2d 1433 (D.C. Cir. 1993) (per curiam), establish that the filing of a petition for reconsideration before the FCC makes the challenged FCC order nonfinal, and therefore nonreviewable by this court, as to the petitioning party.[3] The Commission asserts that the rejected waiver applicants' petitions for review before this court should accordingly be dismissed as incurably premature. We agree that the petitions before this court from large numbers of the rejected waiver applicants raise serious prematurity problems. *TeleSTAR, Inc.* considered the precise question of "whether a petition for review, unripe because of the pendency of a request for agency reconsideration, ripens so as to vest this court with jurisdiction once the agency issues its final decision on reconsideration." *TeleSTAR, Inc.*, 888 F.2d at 133. It held "that this court does not have jurisdiction to consider the prematurely-filed petition for review, even after the agency rules on the rehearing request. In order to obtain review of a now-final agency order, a new petition for review must be filed." *Id.* As the court explained:

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[3] In addition, the rejected waiver applicants themselves concede that nearly every issue raised in this appeal was not raised before the agency.

> While final agency action can ripen an issue for appellate review, the filing of a challenge to agency action before the agency has issued its decision on reconsideration is incurably premature. We hold therefore that when a petition for review is filed before the challenged action is final and thus ripe for review, subsequent action by the agency on a motion for reconsideration does not ripen the petition for review or secure appellate jurisdiction. To cure the defect, the challenging party must file a new notice of appeal or petition for review from the now-final agency order. We develop this bright line test to discourage the filing of petitions for review until after the agency completes the reconsideration process. If a party determines to seek reconsideration of an agency ruling, it is a pointless waste of judicial energy for the court to process any petition for review before the agency has acted on the request for reconsideration.

Id. at 134 (citation omitted); *see also Wade,* 986 F.2d at 1434 ("The danger of wasted judicial effort that attends the simultaneous exercise of judicial and agency jurisdiction arises whether a party seeks agency reconsideration before, simultaneous with, or after filing an appeal or petition for judicial review.") (citation omitted).

However, we do reach the merits of the petitions before this court from Celltel and CT, who have presented petitions that were not premature.

This court held in *Turro v. FCC,* 859 F.2d 1498 (D.C. Cir. 1988), that:

> Our standard for reviewing the FCC's denial of a request for waiver of an agency rule is very deferential. As we stated in *WAIT Radio v. FCC,* 459 F.2d 1203, 1207 (D.C. Cir.), "An applicant for waiver faces a high hurdle even at the starting gate. On its appeal to this court, the burden on [the petitioner] is even heavier. It must show that the Commission's reasons for declining to grant the waiver were so insubstantial as to render that denial an abuse of discretion."

Id. at 1499 (citations omitted); *see also Orange Park Florida T.V., Inc. v. FCC*, 811 F.2d 664, 669 (D.C. Cir. 1987) ("[I]t is elementary that the judiciary may disturb a Commission refusal to waive its rules only in the event of an abuse of discretion."). In *Turro*, the FCC had "concluded that it was preferable to address the policy concerns raised by Turro in a rulemaking proceeding and not in the context of an ad hoc waiver proceeding." *Turro*, 859 F.2d at 1500. The court found that "[t]his decision to proceed by rulemaking is entitled to considerable deference." *Id.*

In this case, the FCC had received hundreds of waiver requests—971 in total—seeking authority to provide point-to-multipoint services on the 28 GHz band, rather than the point-to-point services then-authorized. *See* first NPRM ¶¶ 51–53. The FCC also had pending before it three petitions for rulemaking, two supporting the designation of the 28 GHz band for point-to-multipoint services, and one opposing such a designation. *See id.* ¶¶ 1–13. The Commission denied the waiver requests as a group and proceeded instead with notice and comment rulemaking on the use of the spectrum at issue. As the FCC explained, it had concluded, based on the number of waiver applications and the size of their requests for spectrum space, that granting the waivers would result in a *de facto* reassignment of the 28 GHz band—a band that other parties wanted to use for different, incompatible purposes. *See id.* ¶¶ 51–53; Order ¶ 388. Moreover, the Commission found that the waivers raised common policy questions, involving both the best use of the 28 GHz band and the additional rules that would be needed to govern new uses of that band, questions that would best be addressed in a rulemaking proceeding. *See* Order ¶¶ 389, 402–04, 406.

The FCC's reasoning in this regard was not only rational, but highly sound. The 971 waiver applicants were essentially seeking to use the waiver process as a means of getting the 28 GHz band reassigned. Their petitions raised systemic issues most appropriately considered in a rulemaking proceeding that offered all interested parties the opportunity to comment and gave the agency the opportunity to proceed in a more thorough and fair manner. *See National Small Ship-*

ments Traffic Conference, Inc. v. ICC, 725 F.2d 1442, 1447–48 (D.C. Cir. 1984) ("Notice-and-comment procedures ... are especially suited to determining legislative facts and policy of general, prospective applicability.").

Moreover, the FCC has adequately distinguished its earlier decision, in January 1991, to grant a waiver permitting Hye Crest Management, Inc. to provide point-to-multipoint service on the 28 GHz band. When Hye Crest applied for a waiver, it was the only such applicant. Its proposal was unique and untried. The FCC determined that, "under the circumstances of this proceeding," a formal rulemaking to consider changing the designation of the 28 GHz band was "premature" and that a waiver should be granted as the most efficient way to introduce point-to-multipoint service into New York City (the area in which Hye Crest sought to operate). In re Application of Hye Crest Management, Inc., 6 F.C.C.R. 332, at ¶ 18 (released Jan. 18, 1991). The Commission concluded that "grant of the waiver request does not establish a precedent that will ultimately lead to the de facto reallocation of the 28 GHz band" and stated that it "[did] not anticipate that our action today will result in an onslaught of waiver requests." *Id.* ¶ 19. The FCC also observed that "[s]hould the proposal prove to be a success and the public benefits anticipated become a reality, a general investigation into alternate uses of the 28 GHz band would then be appropriate for consideration." *Id.* ¶ 18. In contrast, by the time that the FCC acted on the instant waiver applications, a number of manufacturers had begun developing equipment to offer point-to-multipoint services on the 28 GHz band and the agency had received almost a thousand requests for waivers to use the band for that purpose—so many that granting them all would have amounted "to a *de facto* reallocation of the 28 GHz band." First NPRM ¶¶ 51–53. To be sure, some of those rejected waiver applicants had filed their applications for waiver as early as 1991, in the early days of what was to become a deluge of requests. But this court has held that the filing of a waiver application does not create a legal interest that restricts the discretion vested in the FCC or compels the agency to review the request as if no time had passed or

circumstances changed since the moment the request was filed. *See Chadmoore Communications, Inc. v. FCC,* 113 F.3d 235, 241 (D.C. Cir. 1997) (citing *Hispanic Info. & Telecomms. Network v. FCC,* 865 F.2d 1289, 1294–95 (D.C. Cir. 1989); *Schraier v. Hickel,* 419 F.2d 663, 667 (D.C. Cir. 1969)). By the time the FCC acted in this case, the circumstances that the FCC had expressly believed would not develop when it granted Hye Crest's waiver had in fact come to pass, so that the agency's reasons for granting the earlier waiver no longer applied.

CONCLUSION

We accordingly deny the petitions for review from all of the petitioners in this case.